

**ASSEMBLY BILL**

**No. 749**

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**Introduced by Assembly Member Gorell**

February 21, 2013

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An act to amend Section 143 of the Streets and Highways Code, relating to transportation.

LEGISLATIVE COUNSEL'S DIGEST

AB 749, as introduced, Gorell. Public-private partnerships.

Existing law, until January 1, 2017, authorizes the Department of Transportation and regional transportation agencies, as defined, to enter into comprehensive development lease agreements with public and private entities, or consortia of those entities, for certain transportation projects that may charge certain users of those projects tolls and user fees, subject to various terms and requirements. These arrangements are commonly known as public-private partnerships. Existing law provides for the Public Infrastructure Advisory Commission, an organization established by the Business, Transportation and Housing Agency, to perform various functions relative to projects identified as suitable for development and delivery under these provisions, including the review of a proposed agreement submitted to it by the department or a regional transportation agency, and to charge a fee for certain of those functions.

This bill would delete the reference to the Public Infrastructure Advisory Commission established by the Business, Transportation and Housing Agency. The bill would instead create a new Public Infrastructure Advisory Commission, with 12 members, of which 5 would be appointed by the Governor, 3 by the Senate Committee on Rules, and 2 by the Speaker of the Assembly. In addition, the Treasurer

and the Director of General Services, or their representatives, would serve on the commission. The bill would assign additional duties to the commission, including a requirement for the commission to make a determination for each agreement submitted to it relative to whether the public-private partnership procurement method is suitable for the project, or whether another procurement method should be used, as specified. This determination would be binding on the department or regional transportation agency. The bill would require the commission to establish best practices for public-private partnerships, and to identify other state departments that would benefit from similar contracting authority. The bill would authorize the commission to charge a fee for certain of these new duties. The bill would also extend the operation of the provisions governing public-private partnerships from January 1, 2017, to January 1, 2019.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 143 of the Streets and Highways Code
- 2 is amended to read:
- 3 143. (a) (1) “Best value” means a value determined by
- 4 objective criteria, including, but not limited to, price, features,
- 5 functions, life-cycle costs, and other criteria deemed appropriate
- 6 by the department or the regional transportation agency.
- 7 (2) “Contracting entity or lessee” means a public or private
- 8 entity, or consortia thereof, that has entered into a comprehensive
- 9 development lease agreement with the department or a regional
- 10 transportation agency for a transportation project pursuant to this
- 11 section.
- 12 (3) “Design-build” means a procurement process in which both
- 13 the design and construction of a project are procured from a single
- 14 entity.
- 15 (4) “Regional transportation agency” means any of the
- 16 following:
- 17 (A) A transportation planning agency as defined in Section
- 18 29532 or 29532.1 of the Government Code.
- 19 (B) A county transportation commission as defined in Section
- 20 130050, 130050.1, or 130050.2 of the Public Utilities Code.

1 (C) Any other local or regional transportation entity that is  
2 designated by statute as a regional transportation agency.

3 (D) A joint exercise of powers authority as defined in Chapter  
4 5 (commencing with Section 6500) of Division 7 of Title 1 of the  
5 Government Code, with the consent of a transportation planning  
6 agency or a county transportation commission for the jurisdiction  
7 in which the transportation project will be developed.

8 (5) “Public Infrastructure Advisory Commission” means ~~a unit~~  
9 ~~or auxiliary organization established by the Business,~~  
10 ~~Transportation and Housing Agency that advises the department~~  
11 ~~and regional transportation agencies in developing transportation~~  
12 ~~projects through performance-based infrastructure partnerships~~  
13 *the commission created pursuant to paragraph (1) of subdivision*  
14 *(b).*

15 (6) “Transportation project” means one or more of the following:  
16 planning, design, development, finance, construction,  
17 reconstruction, rehabilitation, improvement, acquisition, lease,  
18 operation, or maintenance of highway, public street, rail, or related  
19 facilities supplemental to existing facilities currently owned and  
20 operated by the department or regional transportation agencies  
21 that is consistent with the requirements of subdivision (c).

22 (b) (1) *The Public Infrastructure Advisory Commission is*  
23 *hereby created. The commission shall have 12 members, with five*  
24 *members appointed by the Governor, three members appointed*  
25 *by the Senate Committee on Rules, two members appointed by the*  
26 *Speaker of the Assembly, the Treasurer or his or her representative,*  
27 *and the Director of General Services or his or her representative.*  
28 *The members appointed by the Governor and the Legislature shall*  
29 *have a broad mix of expertise related to public-private partnerships*  
30 *and shall serve for four-year terms commencing on January 1,*  
31 *2014. The commission shall do all of the following:*

32 (A) *Identify transportation project opportunities through*  
33 *performance-based infrastructure partnerships throughout the*  
34 *state.*

35 (B) *Research and document similar transportation projects*  
36 *throughout the state, nationally, and internationally, and further*  
37 *identify and evaluate lessons learned from these projects.*

38 (C) *Assemble and make available to the department or regional*  
39 *transportation agencies a library of information, precedent,*

1 research, and analysis concerning infrastructure partnerships and  
2 related types of public-private transactions for public infrastructure.

3 (D) ~~Advise the department and regional transportation agencies,~~  
4 ~~upon request, regarding infrastructure partnership suitability and~~  
5 *Develop a set of best practices for public-private partnership*  
6 *projects in California that are eligible to be developed pursuant*  
7 *to this section, and advise the department and regional*  
8 *transportation agencies, upon request, regarding infrastructure*  
9 *partnership suitability.*

10 (E) Provide, upon request, procurement-related services to the  
11 department and regional transportation agencies for infrastructure  
12 partnership.

13 (F) *Make a determination, with respect to proposed agreements*  
14 *submitted to it for review pursuant to paragraph (5) of subdivision*  
15 *(c), whether a proposed project is best procured using the method*  
16 *authorized by this section or by another authorized method. The*  
17 *determination shall be binding on the department or regional*  
18 *transportation agency. In order for the Public Infrastructure*  
19 *Advisory Commission to make a determination that a project that*  
20 *is the subject of a proposed agreement is suitable for the*  
21 *procurement method authorized pursuant to this section, it shall*  
22 *find that the project meets all of the following criteria:*

23 (i) *The project is technically complex.*

24 (ii) *The project can transfer risks from a public agency to a*  
25 *private partner.*

26 (iii) *The project can benefit from nonstate financing.*

27 (iv) *The project has a revenue source.*

28 (G) *Identify state agencies other than the department that would*  
29 *benefit from similar legal authority to develop partnerships to that*  
30 *provided for transportation projects pursuant to this section.*

31 (2) The Public Infrastructure Advisory Commission may charge  
32 a fee to the department and regional transportation agencies for  
33 the services described in subparagraphs (D) ~~and~~, (E), and (F) of  
34 paragraph (1), the details of which shall be articulated in an  
35 agreement entered into between the Public Infrastructure Advisory  
36 Commission and the department or the regional transportation  
37 agency.

38 (c) (1) Notwithstanding any other provision of law, only the  
39 department, in cooperation with regional transportation agencies,  
40 and regional transportation agencies, may solicit proposals, accept

1 unsolicited proposals, negotiate, and enter into comprehensive  
2 development lease agreements with public or private entities, or  
3 consortia thereof, for transportation projects.

4 (2) Projects proposed pursuant to this section and associated  
5 lease agreements shall be submitted to the California Transportation  
6 Commission. The commission, at a regularly scheduled public  
7 hearing, shall select the candidate projects from projects nominated  
8 by the department or a regional transportation agency after  
9 reviewing the nominations for consistency with paragraphs (3)  
10 and (4). Approved projects may proceed with the process described  
11 in paragraph (5).

12 (3) The projects authorized pursuant to this section shall be  
13 primarily designed to achieve the following performance  
14 objectives:

15 (A) Improve mobility by improving travel times or reducing  
16 the number of vehicle hours of delay in the affected corridor.

17 (B) Improve the operation or safety of the affected corridor.

18 (C) Provide quantifiable air quality benefits for the region in  
19 which the project is located.

20 (4) In addition to meeting the requirements of paragraph (3),  
21 the projects authorized pursuant to this section shall address a  
22 known forecast demand, as determined by the department or  
23 regional transportation agency.

24 (5) At least 60 days prior to executing a final lease agreement  
25 authorized pursuant to this section, the department or regional  
26 transportation agency shall submit the agreement to the Legislature  
27 and the Public Infrastructure Advisory Commission for review.  
28 Prior to submitting a lease agreement to the Legislature and the  
29 Public Infrastructure Advisory Commission, the department or  
30 regional transportation agency shall conduct at least one public  
31 hearing at a location at or near the proposed facility for purposes  
32 of receiving public comment on the lease agreement. Public  
33 comments made during this hearing shall be submitted to the  
34 Legislature and the Public Infrastructure Advisory Commission  
35 with the lease agreement. The Secretary of Business, Transportation  
36 and Housing or the chairperson of the Senate or Assembly fiscal  
37 committees or policy committees with jurisdiction over  
38 transportation matters may, by written notification to the  
39 department or regional transportation agency, provide any  
40 comments about the proposed agreement within the 60-day period

1 prior to the execution of the final agreement. The department or  
2 regional transportation agency shall consider those comments prior  
3 to executing a final agreement and shall retain the discretion for  
4 executing the final lease agreement.

5 (d) For the purpose of facilitating those projects, the agreements  
6 between the parties may include provisions for the lease of  
7 rights-of-way in, and airspace over or under, highways, public  
8 streets, rail, or related facilities for the granting of necessary  
9 easements, and for the issuance of permits or other authorizations  
10 to enable the construction of transportation projects. Facilities  
11 subject to an agreement under this section shall, at all times, be  
12 owned by the department or the regional transportation agency,  
13 as appropriate. For department projects, the commission shall  
14 certify the department's determination of the useful life of the  
15 project in establishing the lease agreement terms. In consideration  
16 therefor, the agreement shall provide for complete reversion of the  
17 leased facility, together with the right to collect tolls and user fees,  
18 to the department or regional transportation agency, at the  
19 expiration of the lease at no charge to the department or regional  
20 transportation agency. At the time of the reversion, the facility  
21 shall be delivered to the department or regional transportation  
22 agency, as applicable, in a condition that meets the performance  
23 and maintenance standards established by the department or  
24 regional transportation agency and that is free of any encumbrance,  
25 lien, or other claims.

26 (e) Agreements between the department or regional  
27 transportation agency and the contracting entity or lessee shall  
28 authorize the contracting entity or lessee to use a design-build  
29 method of procurement for transportation projects, subject to the  
30 requirements for utilizing such a method contained in Chapter 6.5  
31 (commencing with Section 6800) of Part 1 of Division 2 of the  
32 Public Contract Code, other than Sections 6802, 6803, and 6813  
33 of that code, ~~if those provisions are enacted by the Legislature~~  
34 ~~during the 2009–10 Regular Session, or a 2009–10 extraordinary~~  
35 ~~session code.~~

36 (f) (1) (A) Notwithstanding any other provision of this chapter,  
37 for projects on the state highway system, the department is the  
38 responsible agency for the performance of project development  
39 services, including performance specifications, preliminary  
40 engineering, prebid services, the preparation of project reports and

1 environmental documents, and construction inspection services.  
2 The department is also the responsible agency for the preparation  
3 of documents that may include, but need not be limited to, the size,  
4 type, and desired design character of the project, performance  
5 specifications covering the quality of materials, equipment, and  
6 workmanship, preliminary plans, and any other information deemed  
7 necessary to describe adequately the needs of the department or  
8 regional transportation agency.

9 (B) The department may use department employees or  
10 consultants to perform the services described in subparagraph (A),  
11 consistent with Article XXII of the California Constitution.  
12 Department resources, including personnel requirements, necessary  
13 for the performance of those services shall be included in the  
14 department's capital outlay support program for workload purposes  
15 in the annual Budget Act.

16 (2) The department or a regional transportation agency may  
17 exercise any power possessed by it with respect to transportation  
18 projects to facilitate the transportation projects pursuant to this  
19 section. The department, regional transportation agency, and other  
20 state or local agencies may provide services to the contracting  
21 entity or lessee for which the public entity is reimbursed, including,  
22 but not limited to, planning, environmental planning, environmental  
23 certification, environmental review, preliminary design, design,  
24 right-of-way acquisition, construction, maintenance, and policing  
25 of these transportation projects. The department or regional  
26 transportation agency, as applicable, shall regularly inspect the  
27 facility and require the contracting entity or lessee to maintain and  
28 operate the facility according to adopted standards. Except as may  
29 otherwise be set forth in the lease agreement, the contracting entity  
30 or lessee shall be responsible for all costs due to development,  
31 maintenance, repair, rehabilitation, and reconstruction, and  
32 operating costs.

33 (g) (1) In selecting private entities with which to enter into  
34 these agreements, notwithstanding any other provision of law, the  
35 department and regional transportation agencies may utilize, but  
36 are not limited to utilizing, one or more of the following  
37 procurement approaches:

38 (A) Solicitations of proposals for defined projects and calls for  
39 project proposals within defined parameters.

1 (B) Prequalification and short-listing of proposers prior to final  
2 evaluation of proposals.

3 (C) Final evaluation of proposals based on qualifications and  
4 best value. The California Transportation Commission shall  
5 develop and adopt criteria for making that evaluation prior to  
6 evaluation of a proposal.

7 (D) Negotiations with proposers prior to award.

8 (E) Acceptance of unsolicited proposals, with issuance of  
9 requests for competing proposals. Neither the department nor a  
10 regional transportation agency may award a contract to an  
11 unsolicited bidder without receiving at least one other responsible  
12 bid.

13 (2) When evaluating a proposal submitted by the contracting  
14 entity or lessee, the department or the regional transportation  
15 agency may award a contract on the basis of the lowest bid or best  
16 value.

17 (h) The contracting entity or lessee shall have the following  
18 qualifications:

19 (1) Evidence that the members of the contracting entity or lessee  
20 have completed, or have demonstrated the experience, competency,  
21 capability, and capacity to complete, a project of similar size,  
22 scope, or complexity, and that proposed key personnel have  
23 sufficient experience and training to competently manage and  
24 complete the design and construction of the project, and a financial  
25 statement that ensures that the contracting entity or lessee has the  
26 capacity to complete the project.

27 (2) The licenses, registration, and credentials required to design  
28 and construct the project, including, but not limited to, information  
29 on the revocation or suspension of any license, credential, or  
30 registration.

31 (3) Evidence that establishes that members of the contracting  
32 entity or lessee have the capacity to obtain all required payment  
33 and performance bonding, liability insurance, and errors and  
34 omissions insurance.

35 (4) Evidence that the contracting entity or lessee has workers'  
36 compensation experience, history, and a worker safety program  
37 of members of the contracting entity or lessee that is acceptable  
38 to the department or regional transportation agency.



1 (5) A full disclosure regarding all of the following with respect  
2 to each member of the contracting entity or lessee during the past  
3 five years:

4 (A) Any serious or willful violation of Part 1 (commencing with  
5 Section 6300) of Division 5 of the Labor Code or the federal  
6 Occupational Safety and Health Act of 1970 (P.L. 91-596).

7 (B) Any instance where members of the contracting entity or  
8 lessee were debarred, disqualified, or removed from a federal,  
9 state, or local government public works project.

10 (C) Any instance where members of the contracting entity or  
11 lessee, or its owners, officers, or managing employees submitted  
12 a bid on a public works project and were found to be nonresponsive  
13 or were found by an awarding body not to be a responsible bidder.

14 (D) Any instance where members of the contracting entity or  
15 lessee, or its owners, officers, or managing employees defaulted  
16 on a construction contract.

17 (E) Any violations of the Contractors' State License Law  
18 (Chapter 9 (commencing with Section 7000) of Division 3 of the  
19 Business and Professions Code), including, but not limited to,  
20 alleged violations of federal or state law regarding the payment of  
21 wages, benefits, apprenticeship requirements, or personal income  
22 tax withholding, or Federal Insurance Contributions Act (FICA)  
23 withholding requirements.

24 (F) Any bankruptcy or receivership of any member of the  
25 contracting entity or lessee, including, but not limited to,  
26 information concerning any work completed by a surety.

27 (G) Any settled adverse claims, disputes, or lawsuits between  
28 the owner of a public works project and any member of the  
29 contracting entity or lessee during the five years preceding  
30 submission of a bid under this article, in which the claim,  
31 settlement, or judgment exceeds fifty thousand dollars (\$50,000).  
32 Information shall also be provided concerning any work completed  
33 by a surety during this five-year period.

34 (H) If the contracting entity or lessee is a partnership, joint  
35 venture, or an association that is not a legal entity, a copy of the  
36 agreement creating the partnership or association that specifies  
37 that all general partners, joint venturers, or association members  
38 agree to be fully liable for the performance under the agreement.

39 (i) No agreement entered into pursuant to this section shall  
40 infringe on the authority of the department or a regional

1 transportation agency to develop, maintain, repair, rehabilitate,  
2 operate, or lease any transportation project. Lease agreements may  
3 provide for reasonable compensation to the contracting entity or  
4 lessee for the adverse effects on toll revenue or user fee revenue  
5 due to the development, operation, or lease of supplemental  
6 transportation projects with the exception of any of the following:

7 (1) Projects identified in regional transportation plans prepared  
8 pursuant to Section 65080 of the Government Code.

9 (2) Safety projects.

10 (3) Improvement projects that will result in incidental capacity  
11 increases.

12 (4) Additional high-occupancy vehicle lanes or the conversion  
13 of existing lanes to high-occupancy vehicle lanes.

14 (5) Projects located outside the boundaries of a public-private  
15 partnership project, to be defined by the lease agreement.

16 However, compensation to a contracting entity or lessee shall  
17 only be made after a demonstrable reduction in use of the facility  
18 resulting in reduced toll or user fee revenues, and may not exceed  
19 the difference between the reduction in those revenues and the  
20 amount necessary to cover the costs of debt service, including  
21 principal and interest on any debt incurred for the development,  
22 operation, maintenance, or rehabilitation of the facility.

23 (j) (1) Agreements entered into pursuant to this section shall  
24 authorize the contracting entity or lessee to impose tolls and user  
25 fees for use of a facility constructed by it, and shall require that  
26 over the term of the lease the toll revenues and user fees be applied  
27 to payment of the capital outlay costs for the project, the costs  
28 associated with operations, toll and user fee collection,  
29 administration of the facility, reimbursement to the department or  
30 other governmental entity for the costs of services to develop and  
31 maintain the project, police services, and a reasonable return on  
32 investment. The agreement shall require that, notwithstanding  
33 Sections 164, 188, and 188.1, any excess toll or user fee revenue  
34 either be applied to any indebtedness incurred by the contracting  
35 entity or lessee with respect to the project, improvements to the  
36 project, or be paid into the State Highway Account, or for all three  
37 purposes, except that any excess toll revenue under a lease  
38 agreement with a regional transportation agency may be paid to  
39 the regional transportation agency for use in improving public  
40 transportation in and near the project boundaries.

1 (2) Lease agreements shall establish specific toll or user fee  
2 rates. Any proposed increase in those rates not otherwise  
3 established or identified in the lease agreement during the term of  
4 the agreement shall first be approved by the department or regional  
5 transportation agency, as appropriate, after at least one public  
6 hearing conducted at a location near the proposed or existing  
7 facility.

8 (3) The collection of tolls and user fees for the use of these  
9 facilities may be extended by the commission or regional  
10 transportation agency at the expiration of the lease agreement.  
11 However, those tolls or user fees shall not be used for any purpose  
12 other than for the improvement, continued operation, or  
13 maintenance of the facility.

14 (k) Agreements entered into pursuant to this section shall include  
15 indemnity, defense, and hold harmless provisions agreed to by the  
16 department or regional transportation agency and the contracting  
17 entity or lessee, including provisions for indemnifying the State  
18 of California or the regional transportation agency against any  
19 claims or losses resulting or accruing from the performance of the  
20 contracting entity or lessee.

21 (l) The plans and specifications for each transportation project  
22 on the state highway system developed, maintained, repaired,  
23 rehabilitated, reconstructed, or operated pursuant to this section  
24 shall comply with the department's standards for state  
25 transportation projects. The lease agreement shall include  
26 performance standards, including, but not limited to, levels of  
27 service. The agreement shall require facilities on the state highway  
28 system to meet all requirements for noise mitigation, landscaping,  
29 pollution control, and safety that otherwise would apply if the  
30 department were designing, building, and operating the facility.  
31 If a facility is on the state highway system, the facility leased  
32 pursuant to this section shall, during the term of the lease, be  
33 deemed to be a part of the state highway system for purposes of  
34 identification, maintenance, enforcement of traffic laws, and for  
35 the purposes of Division 3.6 (commencing with Section 810) of  
36 Title 1 of the Government Code.

37 (m) Failure to comply with the lease agreement in any significant  
38 manner shall constitute a default under the agreement and the  
39 department or the regional transportation agency, as appropriate,

1 shall have the option to initiate processes to revert the facility to  
2 the public agency.

3 (n) The assignment authorized by subdivision (c) of Section  
4 130240 of the Public Utilities Code is consistent with this section.

5 (o) A lease to a private entity pursuant to this section is deemed  
6 to be public property for a public purpose and exempt from  
7 leasehold, real property, and ad valorem taxation, except for the  
8 use, if any, of that property for ancillary commercial purposes.

9 (p) Nothing in this section is intended to infringe on the authority  
10 to develop high-occupancy toll lanes pursuant to Section 149.4,  
11 149.5, or 149.6.

12 (q) Nothing in this section shall be construed to allow the  
13 conversion of any existing nontoll or nonuser-fee lanes into tolled  
14 or user fee lanes with the exception of a high-occupancy vehicle  
15 lane that may be operated as a high-occupancy toll lane for vehicles  
16 not otherwise meeting the requirements for use of that lane.

17 (r) The lease agreement shall require the contracting entity or  
18 lessee to provide any information or data requested by the  
19 California Transportation Commission or the Legislative Analyst.  
20 The commission, in cooperation with the Legislative Analyst, shall  
21 annually prepare a report on the progress of each project and  
22 ultimately on the operation of the resulting facility. The report  
23 shall include, but not be limited to, a review of the performance  
24 standards, a financial analysis, and any concerns or  
25 recommendations for changes in the program authorized by this  
26 section.

27 (s) Notwithstanding any other provision of this section, no lease  
28 agreement may be entered into pursuant to the section that affects,  
29 alters, or supersedes the Memorandum of Understanding (MOU),  
30 dated November 26, 2008, entered into by the Golden Gate Bridge  
31 Highway and Transportation District, the Metropolitan  
32 Transportation Commission, and the San Francisco County  
33 Transportation Authority, relating to the financing of the U.S.  
34 Highway 101/Doyle Drive reconstruction project located in the  
35 City and County of San Francisco.

36 (t) No lease agreements may be entered into under this section  
37 on or after January 1, ~~2017~~ 2019.

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